Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-472

AFTON M. COON and VERA COON,
Petitioners,

vs.

CHARLES W. BLIVEN & CO., INC.,
HERBERT W. WHITE, HAZEL C. WHITE,
HORACE H. BENTE, JOSEPH B. FRONAPFEL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming an Order Granting Motions for Summary Judgment of the United States District Court, Southern District of Florida.

OPINIONS BELOW

DISTRICT COURT: Opinion contained in Order on Motions for Summary Judgment (Appendix page 1), has not been reported.

COURT OF APPEALS: Opinion (Appendix page 8) is reported at, 534 F.2d 44.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered June 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

By Order entered on September 6, 1976, No. A-214, by Mr. Justice Powell, Petitioners were granted an extension of time to October 6, 1976, to file this Petition.

QUESTIONS PRESENTED

1. IS A CONTRACT FOR THE PURCHASE OF A USED YACHT, OR ANY OTHER MARITIME CONTRACT TO BE GOVERNED BY A UNIFORM MARITIME LAW OR THE LAW OF THE STATE WHERE THE CONTRACT IS MADE?

2. MAY A COURT OF ADMIRALTY APPLY EQUITABLE PRINCIPLES TO AWARD DAMAGES OR REVISE OR CANCEL A CONTRACT FOR THE FRAUDULENT SALE OF A USED YACHT?

(a) IS *CAVEAT EMPTOR* STILL THE RULE BEHIND WHICH A YACHT OWNER AND HIS BROKER CAN HIDE FROM THEIR GROSS MISREPRESENTATIONS OF THE CONDITION OF THE YACHT BECAUSE THE INNOCENT, NAIVE PURCHASER UTILIZED AND PAID FOR THE SERVICES OF AN INCOMPETENT SURVEYOR PROVIDED FOR HIM BY THE BROKER?

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STATEMENT OF PLEADINGS

The complaint was filed by Petitioners Afton M. Coon and Vera Coon, his wife, on September 19, 1973, in Admiralty, Rule 9(h), Fed. R. Civ. Proc., against Respondents Charles W. Bliven & Co., Joseph B. Fronapfel, Horace Bente, Herbert W. White and Hazel C. White (A. 1)

Horace Bente moved for summary judgment on May 25, 1973 (Tr. 488); Plaintiffs on May 30, 1973 (Tr. 498);

White on May 31, 1973 (A. 132); Fronapfel on June 6, 1973 (Tr. 523); Charles W. Bliven & Co., on July 6, 1973 (Tr. 553). White moved for summary judgment on the pleadings on July 17, 1973 (A. 133). Pre-trial stipulation was filed July 20, 1973 (A. 133-157). Summary judgment was entered August 8, 1973 (A. 158-164). Order of Dismissal was entered July 10, 1974 (A. 208), and Motion for Reconsideration denied (A. 208) January 13, 1975 (A. 213). Notice of Appeal was filed January 20, 1975 (A. 214).

The opinion of the Court of Appeals for the Fifth Circuit was entered June 23, 1976, from which this Petition is filed.

STATEMENT OF THE FACTS

Petitioners* are a retired couple from Alaska, who expended their entire life savings of some $50,000 to purchase the Yacht "New Horizon" from its owners of nine years, Herbert W. White and Hazel C. White through the brokerage of Charles W. Bliven & Co., and its salesman, Horace Bente, and thereafter to attempt its repair, and to keep the rusted scrap safe.

The vessel was surveyed by Joseph B. Fronapfel. The complaint alleges that the condition of the vessel was knowingly misrepresented by Defendants to the Plaintiffs; that many defects in the vessel were disguised by cover-

*Petitioners were Plaintiffs below; Respondents were Defendants.
References marked "A" are to the Appendix in the Proceedings in the Court of Appeals.
"Appendix" references are to the appendix attached to this Petition.
References to the Record are "TR".

ing them with fiberglass and caulking, knowing that they could not be discovered by ordinary means; that they failed to disclose material matters in connection with the condition, and that Fronapfel's survey purported to report minor exceptions and recommendations, which could be corrected for minor expenditures, and on the basis of that report and later misrepresentations by Respondents, Petitioners went through with the sale.

Petitioners asked that the contract be rescinded, that they be granted compensatory damages and punitive damages.

Coon's business prior to retiring in 1969 was the operation of a bush flying service (A. 45). He had previously been a photographer (A. 46). In May of 1972, they went to Ft. Lauderdale to look for a boat to take back to Alaska (A. 48) and picked Bliven from ads in the yachting magazines. They went to the office and met Bente.

The next day, Bente showed them one boat, which turned out to have already been sold. He took them to Whites' apartment to see the "New Horizon" (A. 50). On board, White told them he had replaced all the metal in the hull wherever necessary a year before (A. 51). As they looked around, White said that he kept the boat in first class shape and there really wasn't very much to be done to get it in shape for a trip through the Canal and up the West Coast other than some little items on deck. He sounded sincere to Coon (A. 52). White told them that he was having trouble with his knees and that was the only reason he was selling it, and completely convinced them it was a good buy. They told White specifically that they wanted to take it up to Alaska (A. 54). He assured

them that it would be a simple matter to put the boat in shape and when they left with Bente, they were pretty well sold on it and it looked like just what they wanted (A. 57).

Bente told them that they had a real buy and told them that they wouldn't find a boat in that class and they went back to his office (A. 57). He testified that before the sale, he was informed by Coon, "that they couldn't afford to spend too much money, and they had to keep it within a budget," and, "They said they didn't want to go over $50,000" (A. 114), and were intending to take it to Alaska (A. 102-103).

At the office, Coon told Bente they couldn't spend more than $45,000 on it since there were a few things that had to be done to get it ready for a trip. Bente told them that if they could get it for anything under $50,000, it would be a steal. He told them they could put their full confidence in Mr. White, because he was a man of reputation and whatever he told them was the truth, the gospel truth (A. 58-59); but that even though he had told them the truth, the gospel truth about the hull and he had full confidence in him, they should have it surveyed. He told them they would need a trial run and they would have to put down a deposit to make a bid and show good faith, so they could take a trial run. Bente in fact never knew White (A. 103). He advised they offer $45,000, and give him a check for $4,500, as a deposit, which they did (A. 120).

A few hours later Bente returned and told them White had accepted the offer. A deposit receipt which Coon signed, but was not then given a copy, was countersigned by White (A. 129). Bente suggested a survey;

Coon told him that he did not know any surveyors. Bente recommended Fronapfel because of his experience with steel (A. 105; A. 59). "This is the surveyor I recommended for you." (A. 78).

Coon kept telling Bente that he knew nothing about steel hulls and Bente told him that that's what the survey was for and that the surveyor would tell him whether or not to buy that boat. All of the parties took a trial run on the boat. While Coon was looking all over the boat during the trial run, White told Coon that anything he sees is superficial and there was nothing fundamentally wrong with the boat. He repeated that he was selling only because his knees gave out and he could not take care of it any longer (A. 63).

They took the boat up to Bradford Marine for dry docking and survey (Tr. 236). Fronapfel surveyed the bottom by putting his palm on it and looking at it (A. 64). At the same time, White again assured Coon that the bottom was in first class shape (A. 64-65).

White told Petitioners that since the boat was already up on the ways, it would be a shame not to utilize the opportunity to paint the bottom and boot top (A. 67-68). White paid for bottom painting, Coon, $1,300, for the boot top. Fronapfel told Coon that the bottom was in good shape (A. 69). Coon asked what his report was going to be, Fronapfel answered:

> "I am going to O.K. it because it is in good shape just as Mr. White told me." (A. 69).

Coon told Bente that they would take the boat only if they could arrange the repairs within their budget

(A. 70). They told White that they wanted a boat with a sound hull which would be able to make the trip that they had in mind and he assured them that they wouldn't regret buying the boat (A. 71).

Coon asked White if he knew of anything that they should know to make the boat seaworthy because they wanted to know it before they bought it since they had no experience with that type of hull and were limited in their cash and couldn't get involved with anything they couldn't afford. White assured them that they shouldn't have any trouble (A. 72).

On direct inquiry by Coon, White said that stains on the walls of the after cabin were caused by water which had leaked down during rain storms when the air conditioner had to be opened (A. 72). Two weeks after they paid their money and bought the boat (A. 74-75), White confessed that the stains were caused by overflowing of the fuel tanks, and they should never fill the tanks because the fuel would flow back (A. 75). Later evidence indicated the stains were caused by long-standing leaks in the tanks, causing the fuel to spray out.

When Fronapfel delivered his survey, Coon looked it over and examined the exceptions and asked him if that was all he found wrong with the boat; Fronapfel assured him that the boat was in remarkably good shape and that it wouldn't be too big a job to make the repairs. Coon told him that they were retired and were buying the boat out of their entire savings and asked him if it was a good buy for them and he told them it was (Tr. 267). They paid him his bill of $369 (Tr. 268). He told them the boat was worth $62,500, and advised them not to take it to a ship yard to repair the noted exceptions (Tr. 269).

After Fronapfel was paid and left (Tr. 269-270), Petitioners read it over during the night and got to discussing the cost of repairing the listed exceptions, and felt it was out of their reach. The next morning, they told Bente that they were not going through with it because they figured they couldn't handle it. Bente told them: "You have got $4,500 down on this purchase, and Mr. White has taken the boat off the market, and you agreed to pay for the repairs on the boat out there at the yard, and you are going to lose all that if you don't watch out." He told them that they had buyer's jitters. He told them that while they had to go to the ship yard for the survey and bottom painting, the work that Fronapfel indicated could be better done by an independent carpenter (Tr. 259). Bente then said that he would have to go and talk to Mr. White about return of their deposit (Tr. 270).

Bente confirmed at page 35 of his deposition that they had told him that morning that they felt it would run into too much money, but he refused to give them back their deposit of $4,500, because it was solely the prerogative of the seller, and that he would have to take it up with White because it was his sole decision (A. 122-23). He told Coon (A. 123), that White had expenses because he had kept the boat off the market. While Coon did not have a copy at the time, it was a standard Bliven contract (A. 130), and provided:

> ". . . if the vessel fails to pass survey to my satisfaction, I understand that my deposit will be refunded as soon as the survey expenses have been paid."

The next thing Coon knew, Bente came back and told them that White had lowered the price $2,000. Bente added that he had a man who would take care of the repairs of everything that needed to be done on the boat, according to the survey, who would then give them a fixed price that they could afford (A. 84-85). White said that Bente never told him Coon wanted his money back.

Coon still didn't want to go through with the sale, although White had lowered the price, which Coon said they hadn't asked for and didn't know why he did it, even though they thought it was very nice of him.

Bente told them, "Rather than to lose what you have got going here now, the thing to do is, let's go out to the boat and I will bring Felino Rodriguez up from Miami and we will show him everything that needs to be done on the boat, and we will get a price, a fixed price on all these different items, and I will make up a contract with the specified prices and have Mr. Felino Rodriguez and you sign it, sign the contract and you won't have to worry about what it is going to cost you, because you will know exactly." (A. 85).

The parties met on the boat and went over the items in the survey, Bente, Rodriguez, White and Fronapfel. Coon was waiting to see what kind of price they would come up with. While Rodriguez, Bente and Fronapfel were having a discussion about the price, White and Coon were off to the side talking together and White again assured him that he would not find much to do on the boat, and that he should take Bente's advice and not go into a shipyard, but to let Rodriguez do the work (A. 86-87). Fronapfel told them that if they could come up with a price, he

would supervise the repairs and see that they were done in a ship-shape manner (A. 88). Fronapfel denied this in this deposition.

Coon didn't get a price that day, but overnight Bente typed up the contract that gave a price of $2,600 (A. 86-87). Bente stated that Fronapfel had agreed to supervise the work, which Fronapfel also denied. The contract is at A. 156-157.

At an unspecified date, Coon accepted the new purchase price, after the date on which the Rodriguez contract was executed. The date is not clear from the record (A. 129), although it probably corresponds to the date of the bill of sale (A. 5).

The boat was to be taken down to Miami where Rodriguez was to do the work. Coon was convinced after Bente had given them the written contract for a sum certain with Rodriguez, that they could handle the deal financially (A. 89, Tr. 282). They had funds telegraphed down from Alaska and closed the deal (A. 89). Things were delayed a week while Mrs. Coon was in the hospital, but the boat arrived at its Miami dock and Rodriguez began the work (Tr. 286).

Once started, Rodriguez found what White, Bente and Fronapfel already knew, that instead of patchwork on the rail, the rust and dry rot were so extensive the whole rail had to be replaced. He told Coon that he was not able to do the carpentry work, and that he would have to get outside help with experience and equipment; at added cost. When they started the work on the rail, they also found the hull was wasted away with parts rusted through. Some

holes were so bad that they couldn't be fiberglassed over; they were stuffed with wadded fiberglass, sanded down and painted. This condition was found to be extensive throughout the hull (A. 92-93).

As Rodriguez started on the woodwork, he began finding gross areas of dry rot, some of them filled in with a material like epoxy glue or some kind of plaster, smoothed down, and painted (A. 74-95).

One day Bente and White came to the boat and Bente commented that it looked like it would have to go to a shipyard regardless (A. 95-96). In his deposition Bente testified, at page 19, that he was surprised at the condition he saw, particularly the extent of the dry rot (A. 108). Rodriguez finally told them that the work was beyond his capability (A. 96, Tr. 295) and he couldn't do it.

They took the boat to Jones Boat Yard. The owner, Cleveland Jones, told them that M. L. Chadwick had surveyed the boat and to talk to him. Chadwick told them to get Tom Newman to do a joint survey with him (A. 96-97). After they had discussed the survey and the boat's prior condition, Chadwick told them that if Fronapfel had made a survey he would advise another.

Chadwick further told him that it was bad practice to use the type of help recommended by Bente because of the uncertainty of quality and financial recourse (A. 98-99, Tr. 302-303, 303-304).

White testified that he knew for three years the fuel tank had been leaking and had it covered with fiberglass (A. 38). Fronapfel did not note it in his report (A. 24-25, 6-9).

Coon learned of the condition of the tank only after Rodriguez started to find other severe damages. When he went down there and started tapping it with a hammer, the fiberglass and tar peeled off (A. 98-99). Cleveland Jones told him about troubles White had been having with fuel getting into his after cabin from the pitted condition (A. 99).

As far as the repairs were concerned, Fronapfel had previously gotten an estimate at Bradford Marine to do part of the work for $18,000, of which $13,000, was for the cap rail (A. 15). He told Bente about it, but did not note it in his report (A. 17).

Prior to surveying the boat, Chadwick told Coon that when he surveyed it before, while tapping the bottom plates with a hammer, White saw the hammer go through several times and knew that there were holes in the hull (A. 195-203).

While the boat was in Jones Boat Yard, Bente came by and suggested that they put it back together and try to sell it to someone else (Tr. 374-375). Coon testified that the only reason he bought the boat was because he was convinced that he was told the truth by Respondents about its condition and what it would take to repair it, and he believed them.

The substantial thrust of Chadwick's findings were that major areas of the bottom were rusted through and masked with putty and fiberglass and painted over. His findings in his joint survey with Newman in August 1972, showed that many of the prior conditions still existed, but had deteriorated further. None of these findings on the

bottom were noted by Fronapfel in his survey (A. 6-9). Chadwick found holes under the paint in the bottom plates. It is not insurable, except port risk; it is not safe for ocean trips, and the fuel tank is a hazard.

A reasonable minimum estimate for repair by Jones Boat Yard was $37,500 (A. 140).

Based on the record, and the pre-trial stipulation (A. 133-157) argument at the hearing (A. 166-194), Summary Judgment was entered (A. 158-164) in favor of Charles W. Bliven & Co., Horace Bente, Herbert White and Hazel White, from which appeal was taken. This petition is presented to review the affirmance by the Court of Appeals of the Summary Judgment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. This Court represents the last hope for an elderly retired couple to have some chance of recouping their life savings, which were taken from them for a conceded pile of scrap disguised as a yacht.

2. The opinion of the Court of Appeals stands as a now unchallenged textbook for an already unscrupulous business to continue preying on the elderly, naive and inexperienced. It stands at least as a gratuitous guide for them on Florida's extensive waterline as it interprets Florida law, subject to adoption in other states. There would seem to be no distinction, as noted by the Trial Judge, between the sale of a used yacht and a used car (A. 173).

3. Abandonment of Admiralty's traditional application of equitable principles by the Court Below for a *caveat emptor* concept is best illustrated by Respondent Bente, when observing the then revealed true condition of the yacht, advised Petitioners to put it together so he could sell to someone else. There must be some redress against that type knavery.

4. Even if Florida law were applicable to this contract, the Court Below did not follow Florida law, or even its own interpretation of Florida law.

5. The Court Below made impossible findings of fact in its opinion, which have no support in the record, and hamper even the trial allowed.

6. Finally, can this Court really allow this elderly couple from Alaska, and countless others to follow, to be limited in the pursuit of recovery of their life savings from an impoverished, incompetent, uninsured surveyor, an exercise in futility, while the culprits with the money, those who knowingly perpetrated the fraud (as distinguished from the incompetence of the surveyor they chose and foisted on Petitioners), are rewarded for their misdeeds?

LEGAL ARGUMENTS

A.

1. IS A CONTRACT FOR THE PURCHASE OF A USED YACHT, OR ANY OTHER MARITIME CONTRACT, TO BE GOVERNED BY A UNIFORM MARITIME LAW OR THE LAW OF THE STATE WHERE THE CONTRACT IS MADE?

2. MAY A COURT OF ADMIRALTY APPLY EQUITABLE PRINCIPLES TO AWARD DAMAGES OR REVISE, OR CANCEL A CONTRACT FOR THE FRAUDULENT SALE OF A USED YACHT?

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The Appellate Court cited Florida law as the law of the case, and rejected Admiralty Law and its principles of equity, as the applicable law.

This Court has stated that Admiralty causes should be given uniform national interpretation. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Pope & Talbott, Inc., v. Hawn*, 346 U.S. 404 (1953); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1919).

If Florida law is applicable to the purchase of a yacht in Ft. Lauderdale, would Texas law govern the sale of a tanker in Houston? It is quite apparent that the Constitutional reservation of Admiralty and Maritime Jurisdiction in the Federal Government, Article III, Section 2, requires uniform application.

Had the Court Below applied Admiralty Law, the end result would be just as the Fifth Circuit has announced through its Chief Judge John R. Brown:

> "The Chancellor is no longer fixed to the wool sack. He may stride the quarterdeck of maritime jurisprudence and, in the role of admiralty judge dispense with his land locked brother that which equity and good conscience compels***."

Florida Bahamas Lines, Ltd. v. Barge "Star 800", 443 F.2d 1243 (5th Cir. 1970). See also, *Texas Gulf Sulphur Co. v. Blue Stack Towing Co.*, 313 F.2d 359 (5th Cir. 1963).

In Florida Bahama Lines, the Fifth Circuit took it upon itself to protect the mortgagee bank of a commercial

barge. In the cause at bar, the same court went out of its way to deprive retired old folks of a day in Court to attempt to recoup their life savings.

Good conscience dictates that there be fair dealings in business, and should demand more than that when dealing with the aged. The record in this cause is replete with Petitioners' pleas to Respondents to deal fairly with them.

The broker heard their pleas, and knew their circumstances. He conceded that he was informed by Mr. Coon:

> ". . . that they couldn't afford to spend too much money, and they had to keep it within a budget," and, "They said they didn't want to go over $50,000 (A. 114).

When all of the terms of their agreements are added up, equity would demand rescision of the contract. They wanted a yacht to take back to Alaska, and had only $50,000, to purchase, repair and travel with it. That is what the broker knew, and he agreed to service them on those terms. Anything beyond that was outside their stated agreement with him, and should be rescinded.

The broker knew that they could not take that yacht to Alaska for $50,000, and it would take about $90,000. If he didn't know, it was his duty to know and inform Petitioners. He did everything he could to make them believe that they could do it for $50,000, and succeeded. They eventually returned to Sitka, Alaska without their scrap heap or their money.

In its interpretation of Florida law, as reported in its own opinions, the Fifth Circuit had previously held in a ship purchase case:

> "Florida cases hold that misrepresentation by a seller***, or his selling agent***, is actionable if the representor knew, or should have known of the falsity of his representation," (Citations omitted).

Sherman v. Hallbauer, 455 F.2d 1936 (5th Cir. 1972).

If even the *Hallbauer* case were applied, Petitioners should have an action against Respondents White as seller, and the broker who received the commission from them as their selling agent.

There is consequent confusion if one were to read the *Hallbauer* opinion, and then the interpretation thereof by the same court, and it must be clarified.

In their complaint, Petitioners could not allege who hired the surveyor herein. Bente told them that even though White was a man of high reputation, whose word they could accept at face value when he told them the yacht was in perfect shape, they should have it surveyed on their own, and he recommended Fronapfel as an expert in steel hulls. He wasn't. His character commendations of White also were untrue because he not only did not know White, but White was shown to be as mendacious as he was.

The Fifth Circuit, in *Hallbauer*, supra, had previously held that even neglegent misrepresentation (Bente's was more deliberate) is actionable:

> "Read together, Sickler and Wheeler create an anomalous framework for the Florida law of misrepresentation. Representations of a 'special knowledge' agent are immunized from judicial scrutiny, except at the behest of those with whom the special knowledge agent is in privity of contract-in the usual sale or loan transaction, persons hardly likely to be discontent with a too rosy picture of their own salable asset or security. Apparently this protection is granted even when special knowledge agents have actual knowledge that their principal's buyer or lender intends to rely upon their representations. An ordinary agent of the seller, however, whose representations may be expected to carry a good deal less weight than those of his more learned counterpart and who does not designate himself professionally as one entitled to belief, is held accountable to his principal's buyer for even negligent misrepresentation."

The Fifth Circuit, in previous holdings on Florida law, went even further, so that if the court had followed its own opinions, these petitioners would have had their day in court.

> "We have set out the Florida elements of fraud in full above because its law is different from most jurisdictions in that the representor does not have to have knowledge of the falsity of his

> statement to be liable. Instead, negligent misstatement is enough. See, *Watson v. Jones*, 1899, 41 Fla. 241, 25 So. 678, where the Court said that 'when it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistable that he did know that which his duty required him to know.'"

Bobby Jones Apartments, Inc., v. Suleski, 391 F.2d 172 (5th Cir. 1968).

Even more recently, only a few days prior to rendering the opinion herein, the Fifth Circuit held, interpretting Florida law:

> "Under these cases, a plaintiff may recover upon a showing that the defendant knew, or should have known, that facts in his possession invalidated the opinion which he expressed."

Bissett v. Ply-Gem Industries, Inc., 533 F.2d 142 (5th Cir. 1976).

In its opinion herein, the Fifth Circuit, stated Florida law as follows:

> "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually

> learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it."

The operative phrase in that statement of Florida law is, "and actually learns the real facts." The contradiction is quite clear in that the Court Below states that they could find no evidence of any misrepresentation made by White[1] after Petitioners received the survey, but they overlooked the fact that the survey was so deficient, which all the Respondents knew, that Petitioners never "actually learn(ed) the real facts." The Trial Judge denied Fronapfel's motion for summary judgment, so that if the surveyor misrepresented the true facts, then the purchasers did not know the real facts, at least for summary judgment purposes. Also overlooked were the continuing direct misrepresentations by White and Bente after the survey was received.

We therefor return to the question of who hired Fronapfel. He was brought in and lauded by the broker, who protected his fees in the sales contract. He reported material facts about defects and costs of repair to Bente, but not Petitioners. Who was he working for?

Petitioners were faced with a dilemma, forced on them by the Trial Judge. At the pre-trial conference, they were forced to make an election as to the surveyor's employer. Regardless of which party they chose, they were boxed out. They claimed it was an issue of fact to be determined by the trier of facts.

[1]The error of that statement by the Court of Appeals is that the record teems with gross misrepresentations by White at every confrontation with Petitioners, before, during and after the survey.

By forcing the Petitioners to make an election, the Trial Court effectively threw them out of court. If they said the broker hired the surveyor, he would have thrown out the case against the surveyor, who could then come to trial to protect his patron the broker, by claiming he was employed by the purchasers.

On the other hand, under the facts as now existing, the surveyor can plead, under the apparent holding in the *Hallbauer* case, supra, that he was employed by the broker, and that Petitioners have no cause against him. Can the trier of facts again dodge making a decision?

The Fifth Court has stated in *Bobby Jones Apartments*, supra, that fraud is shown by circumstances that make it, "almost irresistable that he did know that which his duty required him to know." It would therefore seem that guidelines in the law are lost, where in the opinion herein, the Court Below now holds that only actual misrepresentations are actionable.

As to what constitutes misrepresentations under even Florida law, the Fifth Circuit noted therein that Florida recognizes that fraud need not be proved with direct evidence where it is incumbent on the representor to know the truth or falsity of his statements. Now the court holds herein it must be direct.

The testimony of Chadwick is most pertinent and compelling, regarding the survey of the vessel on behalf of a potential buyer the year before, compared to the survey he conducted a few weeks after the sale, because it shows more than puffing by White; it shows fraud.

Bente looked at the yacht, torn apart its rusted and holely hull exposed from the camouflage applied by White, its rotted fuel tanks revealed under the peeling plastic and found it worse than even he was led to believe, i.e., he knew it was bad; but nevertheless he told Petitioners to put it together so that he could victimize some other naive, unsuspecting purchaser, which they refused to do. This conduct is protected by the Courts Below, as, it is obvious this is what they did to Petitioners.

The opinions expressed by White and Bente must have some bearing on a case such as this. *Bissett v. Ply-Gem Industries, Inc.*, supra. They examined the survey in order to draw up the Rodriguez contract, and knew they were defrauding the aged purchasers.

The Opinion Below is such that it indicates a helpless feeling by the court in dealing with this type of compulsive fraud by owners trying to unload unwanted vessels (or automobiles as the Trial Judge himself commented) onto the market, by brokers hungry for commissions, and shoddy surveyors scratching for appointments, all unmindful of the consequences of their acts, even if they take the life savings, or endanger the lives of their victims.

3. IS SUMMARY JUDGMENT A PROPER REMEDY WHERE THERE ARE CONTROVERTED ISSUES OF MATERIAL FACTS IN A SUIT FOR DAMAGES INVOLVING FRAUDULENT MISREPRESENTATION OF THE CONDITION OF A USED YACHT?

This cause was decided on summary judgment after the Trial Judge forced Petitioners to make an election they should not have been required to make, i.e., who hired the surveyor Fronapfel. He demanded that the election be made, and then threw out their case against the two parties who had their money. That issue should have been left to trial for the trier of facts.

In doing it, the Trial Judge also ignored the many controverted issues of material fact found in the record, and resolved each and every one of them against Petitioners. The Court of Appeals followed the same procedure, and added a few findings not only unsupported by the record, but are *inter alia* impossible findings, which should be beyond the scope of the appellate function *Sherman v. Hallbauer*, supra.

A review of Petitioners' statement of the facts, supported by citations of evidence in the record, compared to facts found in the opinion, would show at the very least severe conflicts. On motions for summary judgment, conflicts of fact are supposed to be resolved against the movant, not the other way around. *Murphy v. Light*, 211 F.2d 824 (5th Cir. 1954); 224 F.2d 844 (5th Cir. 1955).

The litany of conflicts is long, not only as to Petitioners' against Respondents' testimony, but between the Respondents themselves.

On one particular finding, the Court of Appeals held on a very material issue that Mr. Conn was present when Fronapfel was given a price to replace the rail of $13,000, at $100.00 per foot. Not only did Coon testify that he knew nothing about the price per foot, but the record shows Fronapfel's testimony is that:

1. He did not put in his survey the need to replace the rail.

2. His survey recommended only a few scattered feet of replacement.

3. He told Bente that the entire rail needed to be replaced, but did not tell Coon.

4. He told Bente the cost would be $13,000.00, but did not tell Coon.

Common sense tells us that since the survey did not recommend replacement of the entire rail, Coon could not know that replacement would cost $13,000. However, when he goes to trial against Fronapfel, the impoverished, judgment-proof surveyor, Coon may be bound by this finding, illogical and incomprehensible as it is.

On the very pertinent issue of whether Petitioners made a direct request for return of the deposit, both lower courts held that there is nothing in the record that they ever did.

However, particularly on a motion for summary judgment, how can any other interpretation be placed on Bente's testimony that he told them he couldn't return their deposit without asking White, than that they not only asked, but that Bente fully understood they had made a request? The contract required him to return the money at that point, and does not provide for him to ask the seller, or even consult with him. The Trial Judge said they should have walked away and sued for the deposit. He overlooked that Coon did not have a copy of the contract at that time, that Bente tortiously told him he would lose his deposit unless he went through with the sale, that Bente and White told him he was misreading the survey, but directed that Coon should have sued for $4,500, from Alaska. He overlooked the brutal pressure put on these people by Respondents.

It demonstrates the efficacy of the general policy of the Federal Courts of granting summary judgments only in the few most obvious cases.

Certainly, this record is just not such a case, and a great injustice has been done in granting summary judgments in this case.

CONCLUSION

It is respectively submitted that this Honorable Court grant this Petition to the United States Court of Appeals for the Fifth Circuit to review the Opinion and Judgment of June 23, 1976.

Respectfully submitted,

ARTHUR ROTH
Attorney for Petitioners
1111 Ainsley Building
Miami, Florida 33132
Telephone: (305) 371-5664

By: _____

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition were mailed to James A. Rooney, 136 Antre Avenue, New Rochell, New York; Karl V. Hart, 10th Floor, First National Bank Building, Miami, Florida; and Richard C. Waller, 350 Lincoln Road, Miami Beach, Florida, Attorney for Respondents, this ____ day of October, 1976.

_____
ARTHUR ROTH

APPENDIX

SUMMARY FINAL JUDGMENT FOR THE DEFENDANTS HERBERT W. WHITE AND HAZEL C. WHITE, CHARLES W. BLIVEN & CO. INC. AND HORACE H. BENTE, AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT JOSEPH B. FRONAPFEL

(Number and Title Omitted) (Filed Aug 8, 1973)

This Cause came on to be heard at the Pretrail Conference on the motions of the defendants, Herbert W. White and Hazel C. White, Charles W. Bliven, Horace H. Bente and Joseph B. Fronapfel, for a Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiffs Afton M. Coon and Vera F. Coon filed a complaint that they and the defendants White entered into a contract for the purchase and sale of the motor yacht "New Horizon" owned by the Whites; that the defendant C. W. Bliven & Co. Inc. acted as a broker for the Whites through the employment of the defendant, Horace H. Bente; that defendant, Joseph B. Fronapfel was employed by defendants, Charles W. Bliven & Co., Charles Bliven and Horace H. Bente to make a survey on the condition of the vessel prior to sale; that in reliance on this survey, plaintiffs paid to the Whites the sum of $45,000.00. The complaint in one count charges the defendants knowingly misrepresented the condition of the vessel, conspired to defraud the plaintiffs and breached a fiduciary duty to plaintiffs.

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At oral argument on the motions for summary judgment, plaintiffs agreed to dismiss defendant Charles W. Bliven with prejudice from the suit. At that time, plaintiffs also amended their complaint orally to allege that the surveyor, Joseph B. Fronapfel was employed by the plaintiffs to conduct a marine survey.

Having considered the pleadings, the depositions on file and the memoranda filed in support of and in opposition to the various motions, and having heard oral argument of counsel, the Court finds from the uncontradicted facts that there is no genuine issue as to any material issue of fact as to defendants, Herbert W. White and Hazel C. White, Charles Bliven & Co. Inc. and Horace H. Bente, and that these defendants are entitled to judgment as a matter of law for the reasons given below as to each allegation of the amended complaint. The Court finds there is a genuine material issue of fact as to defendant, Joseph B. Fronapfel and denies said defendant's Motion for Summary Judgment for the reasons given below.

Defendants Herbert W. White and Hazel C. White

The undisputed facts reflect that the plaintiffs contracted to purchase the vessel "New Horizon" according to the "Offer to Purchase and Deposit Receipt" attached as Exhibit A to the Pre-Trial Stipulation signed by the Coons and the Whites. The contract of the plaintiffs was to purchase the vessel for $45,000. "where is" and "as is" subject to a survey and a trial run to be made by plaintiffs or their agents to the satisfaction of plaintiffs. Plaintiffs inspected the vessel personally several times before

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[642]

and after making their offer to the Whites. The plaintiffs hired their own surveyor to inspect the boat and conduct the trial run and in reliance on the report of the surveyor, they agreed to purchase the vessel from the Whites for the reduced price of $43,000. The Coons endorsed on the original contract a statement as follows: "Trial Run, Survey and New Horizon accepted for $43,000. Afton Coon" The transaction was closed accordingly and the plaintiffs accepted possession of the vessel. They have retained possession until the present time and have not offered or tendered a return of the vessel.

For the purpose of their summary judgment motion, the Whites assert that even assuming there were misrepresentations as to the condition of the vessel, that as a matter of law, plaintiffs did not "justifiably rely" on any representations of sellers but instead conducted their own investigation as to the condition of the vessel. The Court agrees and finds as a matter of law that plaintiffs did not "justifiably rely" on any representation of the Whites. The fact that the Coons conducted independent investigations of the vessel personally and through their surveyor precludes them from asserting any deception on the part of the Whites and bars any recovery by plaintiffs against the Whites. Hirschman v. Hodges, O'Hara & Rossell Co., 51 So. 550, 554 (Fla. 1910); Hancoy Holding Co. v. Lambright, 133 So. 631, 634 (Fla. 1931). Cf Consumer Cooperative Association v. McMahan,, 393 S.W.2d 552 (Mo. 1965), Teipel v. Southern Nevada Co., 268 P2d 1081 (Cal.App.

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1954). See also 37 Am.Jr.2d, "Fraud and Deceit", §231.

In many respects the situation is identical with that in the case of W. & S. Job & Company v. Heidritter Lumber Company, 255 F. 311, 3 A.K.R. 619, 621 (2 C.A. 1918). In Heidritter, the Court stated:

> A surveyor, at the request of the plaintiff in error, examined the vessel and made a formal report of her condition before its purchase. He pronounced her seaworthy, and although the vessel still had lumber in her hold, ample opportunity was afforded, either for further examination or some insistence upon a warranty. This was not done, and, after the report of the surveyor, the contract of sale was made. The rule of caveat emptor applies to the sale of a vessel under these circumstances and in the absence of an expressed warranty."

The conspiracy allegation is without merit. In their deposition plaintiffs testified that they did not know of any facts supporting the conspiracy allegations except that the vessel was not as represented to them. In addition, plaintiffs' counsel in the course of oral argument admitted that plaintiffs did not have any evidence of a conspiracy. Vague and conclusory allegations of a "conspiracy" are not sufficient to forestall an award of summary judgment. See Hoffman v. Herdman's Ltd., 41 FRD 275 (S.D.N.Y. 1966).

Plaintiffs' contention that the Whites breached a fiduciary obligation to the Coons is also without merit. There
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are no facts to support the allegation of the existence of a fiduciary relationship between the Coons and the Whites as buyers and sellers of a vessel.

Defendants Charles W. Bliven & Co. and Horace H. Bente

It does not appear that defendant, Charles W. Bliven & Co. Inc. was properly served with process. However, the Court will treat the Motion for Summary Judgment filed by said defendant as waiving the service of process for the purpose of the determination of the Motion for Summary Judgment.

Charles W. Bliven & Co. Inc. is the employer of the defendant, Horace H. Bente. Corporate liability exists only insofar as its agent Bente is liable.

The undisputed testimony reflects that the defendant Bente did not know the Whites previous to the time he first showed the Coons the "New Horizon"; that he had never seen the vessel before; and that he did not know of any defects in the vessel when he showed the boat to the Coons.

The Coons entered into a contract with the Whites, accepted the survey and trial run, and paid the purchase price. The contract expressly provided that Charles W. Bliven & Co. Inc. could not guarantee the accuracy of any information regarding the vessel passed on to plaintiffs and provided that the Coons would make their own independent investigations.

Although not contained in any pleading, plaintiffs claim at the hearing that Bente should have returned their
[644] [645]
$4,500.00 deposit pursuant to the terms of the contract whey they visited him in his office and told him they did not think they would go through with the deal after read-

ing the survey. Plaintiffs argue that failure to do so constituted an actionable wrong against plaintiffs.

There is no evidence in the record that plaintiffs actually demanded the return of the deposit. If demand was made, it was unquestionably made after the five day time limit for plaintiffs' final acceptance of the vessel had expired. Furthermore, there is no evidence that Bente refused to return the funds. He simply stated that he would have to check with Mr. White. Mr. White agreed to reduce the purchase price and plaintiffs accepted. If plaintiffs had walked away at the time the deposit allegedly was not returned, they could have sued for the return of the money, but their subsequent actions have barred that suit. They cannot now convert that into a claim for damages for their subsequent decision to purchase what is now alleged to be a defective vessel at a reduced price.

It is also significant that plaintiffs do not allege and in fact deny any contractual relationship with the defendant, Bente, and the facts do not support such a relationship.

Defendant Joseph B. Fronapfel

There is an issue of fact as to the negligence of this defendant in rendering what is alleged to be a grossly incorrect marine survey. Whether Fronapfel faithfully dis-
[645] [645]
charged his responsibility to his clients, the Coons, for his survey and whether plaintiffs were damaged by the alleged inadequate survey are issues which must be resolved at a trial on the merits. See Sherman v. Hallbauer, 455 F.2d 1236 (5 C.A. 1972).

For the foregoing reasons, it is

ORDERED, ADJUDGED and DECREED as follows:

1) That the motions of the defendants, Herbert W. White and Hazel C. White, Charles W. Bliven & Co. Inc., and Horace H. Bente for Summary Judgment be and the same are hereby granted and the complaint be and the same is hereby dismissed as to said defendants.

2) That the motion of defendant, Joseph B. Fronapfel for Summary Judgment be and the same is hereby denied.

3) Costs will be taxed in accordance with the rules of this Court.

DONE AND ORDERED at Miami, Florida, this 7 day of August, 1973.

s/James Lawrence King

UNITED STATES DISTRICT COURT

United States Court of Appeals,
Fifth Circuit.

No. 75-1306

COON v. CHARLES W. BLIVEN & CO., INC.
Afton M. COON et al.,
Plaintiffs-Appellants,
v.

CHARLES W. BLIVEN & COMPANY, INC., et al.,
Defendants-Appellees.

June 23, 1976.

Buyers of yacht brought action for fraudulent misrepresentation against sellers, yacht brokerage firm and employee of the brokerage firm, and against marine surveyor for negligence. The District Court for the Southern District of Florida, James Lawrence King, J., granted summary judgment in favor of all defendants except for the marine surveyor and dismissed action against marine surveyor for lack of prosecution and the buyers appealed. The Court of Appeals, Tuttle, Circuit Judge, held that where sellers had made no representations concerning the yacht after buyers received written report from their marine surveyor, the sellers were not liable for any misrepresentations: that yacht brokerage firm and its employee who had never seen the yacht before and who indicated that they would not guarantee accuracy of information which they passed on to the buyer from the sellers were not liable for misrepresentations; that there was no showing that buyers had demanded return of deposit from brokerage firm; that issues of fact existed

as to claim of negligence on part of the marine surveyor; and that it was error to dismiss for failure to prosecute where attorney's failure to appear when case was called was due to confusion over timing of calendar call for the day.

Affirmed in part and reversed and remanded in part.

1. Conspiracy—9

Fraud—27

Under Florida law, sellers of yacht who assured buyers that the yacht was in good condition but who made no representations following buyers' receipt of marine survey which showed certain defects to be present were not liable for misrepresentation concerning the condition of the boat nor for conspiracy or breach of fiduciary duty.

2. Fraud—30

Yacht brokerage firm and its employee who had never seen yacht before sale, who did not know of any defects in the vessel, and who did not guarantee accuracy of any information regarding the vessel passed on to the buyers by the firm from the sellers were not liable to the buyers for any misrepresentations concerning the condition of the boat.

3. Brokers—96

In the absence of evidence that buyers of yacht made specific demand on yacht brokerage firm for return of deposit and in the absence of any evidence that agent

of the firm refused to return the money or did anything more than simply state that he would have to check with the sellers, buyers were not entitled to recover from the firm for failure to return deposit pursuant to terms of contract.

4. Brokers—96

Actions of buyers of yacht in agreeing with sellers to a lower purchase price after buyers allegedly demanded return of deposit constituted a waiver of whatever rights they had against yacht brokerage firm for return of deposit.

5. Negligence—136(14)

Evidence that marine surveyor hired by buyers recommended purchase of the yacht after examining the yacht in and out of the water and that the vessel, which was to be sold for $43,000, was later determined to need $37,000 worth of repairs raised question of fact as to negligence of the surveyor.

6. Federal Civil Procedure—1762

Where there was no deliberate disobedience or misunderstanding of clear instruction with respect to plaintiffs' attorney's failure to appear when the case was called and where that failure resulted from confusion as to instructions over timing of calendar call for the day, it was error for court to dismiss the action for lack of prosecution upon failure of attorney to appear.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

This is a diversity case arising out of the purchase of a yacht, the "NEW HORIZON," by appellants Afton and Vera Coon, a retired couple from Alaska. Following their acquisition of this vessel in Florida, appellants discovered its condition to be such as to require extensive and costly repairs to enable it to make the return trip to Alaska. They then instituted the instant suit for fraudulant misrepresentation against the "NEW HORIZON" 's previous owners, the Whites, against Charles W. Bliven & Co., the yacht brokerage firm which arranged the sale of the vessel, and against Horace Bente, the Bliven and Co. employee with whom appellants had dealt. In addition, apellants sued the marine surveyor, Joseph Fronapfel, who had inspected the yacht and certified it to be in satisfactory condition, for negligence.

Following extensive pretrial discovery proceedings and hearings, the district court granted summary judgment in favor of defendants Bliven & Co., Bente, and the Whites, but found that there were issues of fact as to defendant Fronapfel's negligence in conducting the marine survey of the "NEW HORIZON," and consequently denied Fronapfel's motion for summary judgment, ultimately setting the trial of that case for early July, 1974. When counsel for appellants failed to answer the calendar call on the appointed day, the district court dismissed the case for failure to prosecute with reasonable diligence. The

Coons have appealed from the district court's grant of summary judgment as to the Whites, Bente and Bliven and Co., and from its dismissal of the suit against Fronapfel for failure to prosecute. Following a brief summary of the relevant facts, we deal with each of these actions by the district court in turn.

Petitioners are a retired couple from Alaska, who traveled to Ft. Lauderdale, Florida in May 1972, to look for a boat to take back with them to Alaska. They selected Bliven & Co., a yacht brokerage firm, from an ad in a yachting magazine, and went to Bliven's local office to inquire about finding a suitable vessel to purchase. There they met appellee Bente, who shortly thereafter took them to see the "NEW HORIZON," owned by appellees Herbert and Hazel White. Some discussion ensued concerning the purpose for which the Coons were buying a boat, and the general condition of the "NEW HORIZON," which Mr. White assured appellants was sound. Back at the Bliven & Co. office, Mr. Coon told Bente they could not offer more than $45,000 for the vessel. Bente advised the Coons to make an offer for $45,000, giving a check for $4,500 as a deposit, and making the ultimate purchase contingent on a marine survey satisfactory to the Coons.

On May 18, 1972, the Coons executed an "Offer to Purchase and Deposit Receipt," which stated, inter alia, that the offer was for the vessel "'where is' and 'as is' free and clear of all liens and encumbrances and is subject to a survey to be made by me to my satisfaction by myself and/or my agent." Furthermore, the agreement provided, "I also understand that Charles W. Bliven & Co. has offered me this vessel on behalf of the owners in good faith, but cannot guarantee the accuracy of such informa-

tion and that I will instruct my agents to check such details as I desire validated." Appellee White countersigned this document in acceptance of the offer.

At the Coons' request, Bente then procured the services of appellee Fronapfel to conduct a trial run and marine survey of the "NEW HORIZON" prior to consummation of the sale. Fronapfel conducted a trial run of the vessel, with appellants on board, and surveyed the boat both in and out of the water. He prepared and submitted a written report, including a list of exceptions, for the Coons, but generally recommended the vessel for purchase. At this point, appellants apparently became somewhat concerned about the financial ability to afford whatever repairs would be needed. It is clear from the record, for example, that at one point during the time at which Fronapfel was conducting the drydock portion of his survey at a local marine shipyard, one of the assistant yard supervisors was present and gave an estimate of what it would cost to repair the ship's cap railing, which was deteriorating from rust and dry rot at several places. In Coons presence, the shipyard assistant estimated it would cost $100 per linear foot, or about $13,000, to sandblast, treat, and replace the entire cap rail.

Fronapfel assured appellants, however, that this particular shipyard's repair costs were usually high, and that they could probably arrange for repairs within their budget, either by going to a smaller shipyard or by contracting out the work to an independent carpenter. After the Coons continued to express doubts to Bente, however, he went to the Whites, who lowered their asking price to $43,000. Bente reported this to the Coons and told them that he knew of someone who would take care of the re-

pairs for a fixed price. Bente then brought the Coons together with a Felino Rodriguez, who looked the boat over and contracted to fix certain specified items for $2,600. At an unspecified date after that, the Coons accepted the new purchase price of $43,000, paying the balance of the money due after signing the contract with Rodriguez.

Once started on the repair work, Rodriguez discovered that the railing could not be patched; the rust and dry rot were so extensive that the whole rail had to be replaced. Furthermore, the hull was in extremely bad repair, and the gas tank showed extensive signs of leakage. Rodriguez, informed the Coons he could not complete the contract for what he had estimated, and they released him from it. They then had the vessel surveyed at a local shipyard, resulting in an estimate of approximately $37,000 to make the needed repairs. Appellants then instituted this suit for damages for negligence by Fronapfel and misrepresentation by the other parties.

Herbert and Hazel White

In their motion for summary judgment below, the Whites asserted that assuming arguendo that there were misrepresentations as to the condition of the vessel, as a matter of law, appellants did not "justifiably rely" on any representations of the sellers but instead conducted their own investigation of the yacht's condition. Appellants' contentions to the contrary notwithstanding,[1] we find that

[1]Appellants' reliance on Sherman v. Hallbauer, 455 F.2d 1286 (5th Cir. 1972). is misplaced. In Sherman, this Court held only that the district court had erred in granting the defendant surveyor's motion for summary judgment in light of the fact that the plaintiffs had pleaded facts sufficient to establish a contractual relationship between themselves and the surveyor, as was required for recovery in a negligence action against a surveyor under Florida law.

Florida law is quite clear on this point. The Supreme Court of Florida has stated:

> "If after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information. and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences or purports, or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness."

Hirschman v. Hodges, O'Hara & Russell Co., 59 Fla. 517, 51 So. 550, 554 (1910). Accord, Hancoy Holding Co. v. Lambright, 101 Fla. 128, 133 So. 631, 634 (1931); see also W. & S. Job & Company v. Heidritter Lumber Company, 225 F. 311 (2nd Cir. 1918).

[1] Here the Coons hired a marine surveyor who conducted a survey and trial run of the vessel and provided them with a written report of his findings. We have examined the record carefully and have found no evidence of any material representations concerning the vessel by the Whites following appellants' receipt of the survey, and hence it is clear, under the legal principles cited above and the facts of the case with respect to the Whites, that the district court did not err in granting summary

judgment for them. Moreover, this conclusion holds true with respect to appellants allegations of conspiracy and breach of fiduciary duty by the Whites to them; the record simply does not contain any evidence whatsoever to support either of these charges.

Horace H. Bente and Charles W. Bliven & Co.

Appellee Horace Bente is employed by the corporate appellee Charles W. Bliven & Co., and, as the district court noted, corporate liability exists only insofar as appellee Bente is liable. Based upon the following undisputed facts, this Court finds that the district court did not err in granting summary judgment as to either Bente or Bliven & Co.

[2] The record clearly shows without dispute that Bente did not know the Whites prior to the time he first showed the Coons the "NEW HORIZON;" that he had never seen the yacht before; and that he did not know of any defects in the vessel when he showed the boat to appellants. Furthermore, the contract into which appellants entered with the Whites specifically stated that Charles W. Blivens & Co. could not guarantee the accuracy of any information regarding the vessel passed on to appellants, and provided that appellants would make their own independent investigations of such details as they might desire validated. These uncontradicted facts are more than sufficient to justify a grant of summary judgment for Bente and the company on the misrepresentation count.

[3, 4] Appellants' remaining allegation against Bente concerns his failure to return their deposit pursuant to the terms of the contract when they visited him in his office and told him they did not think they would go

through with the deal after reading the survey. There is no evidence in the record that a specific demand was made for the return of the deposit at this point. We have examined the record closely and are in agreement with the district court that, even assuming arguendo that such a demand for the return of the deposit was made, there is no evidence that Bente refused to return the money—he simply stated that he would have to check with the Whites. Furthermore, appellants' subsequent actions in accepting a lower purchase price from the Whites would appear to constitute a waiver of whatever rights they had at that point.

Joseph B. Fronapfel.

[5] This Court is also in agreement with the district court's ruling that there remains an issue of fact as to the negligence of defendant Fronapfel, the marine surveyor hired by appellants to assess the yacht's condition prior to purchase. We find, however, for the reasons below, that the district court erred in its eventual dismissal of the suit against Fronapfel on July 10, 1974, for failure to prosecute.

[6] According to appellants' attorney's explanation of the facts, which has not been disputed, he was out of town trying another case on the morning on which calendar call for the suit against Fronapfel had been scheduled, but had arranged with another attorney in his office to answer the call for him. A series of telephone calls from the judge's chambers to appellants' attorney's office concerning alterations in the docketing of the case for calendar call followed, with the final call informing him that the Fronapfel suit was set second on the calendar for Monday morning, July 8th. On that morning, appellants'

lawyer was, according to him, prepared for trial, and waited in his office for more precise instructions by phone concerning the time the case would be called for trial. Upon calling the court late Monday afternoon, counsel was notifield that the case had been dismissed when no one had answered calendar call for appellants.

The circumstances described above, we feel, do not warrant the remedy of dismissal for failure to prosecute. Here there was no deliberate disobedience or misunderstanding of a clear instruction, but rather simply some confusion as to instructions over the timing of the calendar call for that day. This Court has expressed the view that dismissal of an action for failure to prosecute with reasonable diligence is action which is "too harsh except in extreme circumstances." Flaksa v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir. 1968). While dismissal is a discretionary matter, it has usually been approved "only in the face of a clear record of delay or contumacious conduct by the plaintiff," Durham v. Florida Const. Ry Co., 385 F.2d 366, 368 (5th Cir. 1967), and district courts should first resort to lesser sanctions. Flaksa, supra, at 888. In light of these guidelines, this Court finds that under the circumstances here, the district court erred in dismissing appellants' suit against Fronapfel.

The district court's grant of summary judgment against appellees Herbert and Hazel White, Horace H. Bente, and Charles W. Bliven & Co. is therefore AFFIRMED. The court's dismissal of appellants' action against appellee Fronapfel, for failure to prosecute with reasonable diligence, however, is REVERSED, and the case remanded for further proceedings not inconsistent with this opinion.